STATE OF VERMONT

SUPERIOR COURT
Washington Unit

FILED

CRIMINAL DIVISION
Docket No. 1-1-18 Wncm

FEB 16 2018
VERMONT SUPERIOR COURT
WASHINGTON

In Re: VSP-TK / 1-16-18 Shooting

ENTRY ORDER

The case comes before the Court in the context of an inquest proceeding initiated at the request of the Washington County States Attorney.[1] 13 V.S.A. § 5131 et seq. The request for an inquest resulted from an incident in Montpelier on January 16, 2018, in which State and local police officers shot an armed robbery suspect to death on the grounds of Montpelier High School. A reporting team from WCAX TV arrived at the scene about a half hour before the shooting and began filming from a distance of about 300 feet away. Parts of their footage, including film showing the shooting itself, were broadcast four times that day, and twice on television that evening with accompanying commentary by a local attorney. The State's demand for that video footage is resisted by WCAX under the provisions of the newly-enacted Journalist's Privilege. 12 V.S.A § 1616.[2]

Procedural Posture of the Case

The State began its investigation into the shooting and requested the inquest on January 17, 2018. It requested, and the Court issued, a subpoena to WCAX TV to "produce video footage from the shooting at Montpelier high school on Tuesday January 16, 2018." Essentially, the State demanded copies from WCAX of all of its video film footage taken from the time of their arrival at the scene on January 16th to the conclusion of the filming. After an apparent exchange of letters between the State and Counsel for the station, the station filed, on January 26th, a Motion to Quash the Subpoena and for Protective Order. The State responded with its Response to the Motion to Quash on February 7, and hearing was held before the undersigned on February 13.

[1] At the beginning of the hearing on 2/13/18 the State asked that the proceedings be closed. It argued that inquests were secret and investigatory in nature. Indeed, it has been held that inquests are investigatory devices, *In re D.L.*, 164 Vt. 223 (1995), and in the experience of the undersigned are traditionally not opened to the public. The inquest procedure is created in Chapter 161 of Title 13 of the Vermont statutes. While the statutes require that the stenographer (we would now call that the court recorder) must swear an oath of secrecy (section 5134), no statute explicitly makes all inquest proceedings secret or even confidential. In *State v. Alexander*, 130 Vt. 54,61 (1971) the Supreme Court noted that inquest proceedings, like grand jury proceedings, were intended to be secret. In this case, the undersigned granted the State's request and excluded the public from the evidentiary portion of the proceedings. On reflection, given that this is an inquest proceeding and because the Court discusses the likely purpose of the inquest, the Court concludes that this decision should, in its entirety, be sealed and not available to the public unless indictments or informations result from this inquest..

[2] Eff. 5/17/17.

Findings of Fact

On January 16, 2018, the Vermont State Employees Credit Union (hereafter VSECU) was held up by an armed robber. The suspect, later identified as Nathan Giffin, left the VSECU on foot and ran in a roughly westerly direction, taking him across and onto the grounds of the nearby Montpelier High School. Responding State and local police quickly encircled Mr. Giffin who was confined to the playing fields adjacent to the school. Mr. Giffin had in his hand what appeared to be a handgun and waved it around as police surrounded him.

A news crew from WCAX, including reporter Tyler Dumont, arrived at the scene and were kept about 100 yards away by police. Nevertheless, they began filming and captured approximately 38 minutes of video recording, including the shooting of Mr. Giffin by police.

Mr. Giffin and police were conversing during this time. Channel 3 was too far away for its equipment to capture audio of what was being said. About 8 ½ minutes into their recording police opened fire on Mr. Giffin, killing him. Channel 3 continued to record for another 30 minutes, and the Parties stipulated that it had a total of about 38 minutes of film from the incident, of which it broadcast that evening two clips consisting of a few minutes each.[3] Each of the clips broadcast included the shooting itself.

Before broadcasting the material in the evening segments, Channel 3 consulted with local attorney Jerry O'Neil, a former federal prosecutor. They showed Mr. O'Neil most if not all of their film, including the portions broadcast and the portions not used, apparently called "outtakes" in the television news business. The relevant excerpts started with this introduction:

> Reporter Dumont: O'Neill reviewed raw video captured by a Channel 3 News Photographer which shows suspect Nate Giffin walking around on an athletic field while holding a gun.

Transcript of WCAX News Broadcast 1/18/18. Court's Ex. I, p. 3, lines 6-9.

Mr. O'Neil then went on to opine that "It's hard to understand why they shot at that point . . . and you have to wonder whether it was necessary or not." *Id.* at p. 4, lines 4-5, and lines 23-24. In the other broadcast, Court's Exhibit II, O'Neill states that the "video is somewhat objective evidence." *Id.* at p. 3, lines 23-24. He also repeated his comments wondering out loud if the shooting was necessary. *Id.* at p. 4, lines 9-10.

The Vermont State Police assumed the lead role in the investigation into what became the officer-involved shooting. Detective Sergeant Tyler Kinney is an investigator assigned to the Vermont State Police Major Crimes Unit. For reasons not made clear, Sgt. Kinney did not appear at the hearing on 2/13 to testify in person. Rather, he appeared by telephone.

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[3] Channel 3 apparently broadcast a total of four clips showing the events during the day into the evening; however, it appears that only two of the clips included the opinions given by Mr. O'Neill.

Sgt. Kinney testified, and the Court so finds, that police have interviewed about 70 witnesses since the incident happened. Of that group of witnesses, slightly fewer than half saw the shooting and its aftermath. Of that group who saw the shooting, most were closer to the shooting itself than the Channel 3 news crew, and of that sub-group, all were either law enforcement officers or first responders. Some of the officers were only 25-30 feet away from Mr. Giffin when the shooting began. SGT Kinney testified that he wants to see all of the channel 3 video footage because, other than two Montpelier Police cruiser cam videos, which do not show the shooting, they have no other video of the events before the shooting. Despite the presence of dozens of law enforcement officers, some apparently wearing body cameras, there are no official police recordings of the incident.

Police are now close to finishing their investigation. However, they have not yet completed a crime-scene diagram and SGT Kinney had not seen the measurements or the actual diagram at the time of the hearing. SGT Kinney could not recall if he had read the transcripts of the Channel 3 broadcasts and was not sure where exactly their film crew was positioned while taking their video. He agreed that on the broadcast portions of the Channel 3 videos you cannot hear Mr. Giffin or police conversations but do hear—after Mr. Giffin is seen falling—the shots being fired. Despite the passage of almost a month, neither the Attorney General, represented at the hearing by Mr. Meenan, nor Mr. Thibault, the Washington County States Attorney, had read any of the witness statements nor viewed any of the evidence developed by the police at the time of the hearing on the Motion to Quash.

Another television station, WPTZ Channel 5, based in Plattsburgh, New York, also filmed some of the events. However, SGT Kinney has not viewed any of their video footage and the State has not sought its disclosure. Apparently, in response to a plea the police put out for anyone who filmed the events to provide that to police, one short video was obtained from an employee of the nearby Vermont Department of Labor, who filmed the incident from just after the shooting to a few seconds thereafter. SGT Kinney testified that he thought it would be helpful to the investigation to have the video taken by WCAX before the shooting and opined that what they had "might be relevant".

When the incident began to unfold, all of the students and staff in the nearby Montpelier high school were moved away from the rooms adjacent to the playing fields to areas remote and protected from the ongoing incident. However, an assistant principal, a Mr. McCracken, did take a still photo of the suspect on the field from a school window. See, Movant's Motion to Quash at page 7.

Analysis and Opinion

This case represents the first invocation by a journalist or journalism organization of Vermont's newly enacted (2017) journalist privilege statute. 12 V.S.A. § 1616. Before the Statute was enacted, Vermont had a common-sense approach to journalistic claims of privilege embodied in the decision in *Spooner v. Town of Topsham*, 2007 VT 98, 182 Vt. 328. In *Spooner*, the Supreme Court held that in order to overcome a claim of journalistic privilege:

> [A] proper resolution of the privilege claim must balance any First Amendment interests at stake against the moving party's demonstrated interest in disclosure,

an interest which must show at a minimum "that there is no other adequately available source for the information and that it is relevant and material" to a significant issue in the case.

Id. at ¶ 17.

Spooner involved non-confidential materials: an effort to force a reporter to testify about what he had heard at a selectboard meeting. The Court drew an important distinction between observations made by witnesses and recordings of the same event:

> Thus, a journalist's *observation* of an unrecorded, transitory event—such as the selectboard hearing in this case—is not the sort of objectively verifiable information that might typically be retrievable from an alternative source in the usual reporter's privilege case. Rather, owing to the vagaries of perception and memory, the reporter and the alternative witnesses here are not in any meaningful sense "alternative sources of the *same* information, but sources of *different* information." *Delaney v. Superior Court*, 789 P.2d 934, 957 (1990) (Mosk, J., concurring) (agreeing with the majority holding that newspersons who witnessed an arrest were required to testify as to their observations) (initial emphasis added); see also *Prince George's County v. Hartley,* 822 A.2d 537, 544 (2003) (holding that police officer was entitled to reporters' testimony concerning remarks they had heard and quoted in articles "[b]ecause the information he seeks from the reporters is their contemporaneous observations of a transitory event" and thus "no real alternative source of the information exists").

Id. at ¶ 19.

The new statute defines journalist broadly,[4] and seeks to overrule *Spooner* and replace it with a far more stringent and comprehensive set of journalistic privileges. It distinguishes between news and information obtained in a confidential and non-confidential fashion, and then establishes nearly insurmountable standards for disclosure.

- **(b)** Compelled disclosure.
  (1) No court or legislative, administrative, or other body with the power to issue a subpoena shall compel:

[4] A journalist is defined as an individual or organization engaging in journalism. 12 V.S.A. § 1616(a)(1). Journalism is defined as "reporting, publishing, or distributing news or information to the public . . . whether or not the news or information is ultimately published." *Id.* § 1616(a)(2). Unlike the New York statute on which Vermont's new statute appears to be based, there is no commercial nexus required to show that one is a journalist. Under the expansive Vermont definition, it would seem that anyone with a smart phone and email account might be considered a journalist if they film something noteworthy and then broadcast or post it to social media or outlets like YouTube; not to mention the millions of "bloggers" or social media users who regularly "report" or "distribute" what they consider to be "news." For the purposes of this decision, the Court will find that WCAX TV is a journalistic organization that has, for many decades, had as its principal business purpose dissemination of news and news analysis to the public.

- **(A)** a journalist to disclose news or information obtained or received in confidence, including:
  - **(i)** the identity of the source of that news or information; or
  - **(ii)** news or information that is not published or disseminated, including notes, outtakes, photographs, photographic negatives, video or audio recordings, film, or other data.
- **(B)** A person other than a journalist to disclose news or information obtained or received from a journalist if a journalist could not be compelled to disclose the news or information pursuant to subdivision (A) of this subdivision (1).

(2) No court or legislative, administrative, or other body with the power to issue a subpoena shall compel:

- **(A)** A journalist to disclose news or information that was not obtained or received in confidence unless it finds that the party seeking the news or information establishes by clear and convincing evidence that:
  - **(i)** the news or information is highly material or relevant to a significant legal issue before the court or other body;
  - **(ii)** the news or information could not, with due diligence, be obtained by alternative means; and
  - **(iii)** there is a compelling need for disclosure.
- **(B)** A person other than a journalist to disclose news or information obtained or received from a journalist if a journalist could not be compelled to disclose the news or information pursuant to subdivision (A) of this subdivision (2).

- **(c) No implication of waiver. --** The publication or dissemination of news or information shall not constitute a waiver of the protection from compelled disclosure as provided in subsection (b) of this section.

12 V.S.A. § 1616(b)-(c).

In this case, the Parties agree that all of the WCAX videography and reporting was based on non-confidential sources and activities. Their news crew, led by Tyler Dumont, arrived at the scene and began filming from about 300 feet away. Their activities were completely open to the public and were non-confidential.

When it comes to non-confidential information, the statute establishes a three-part test to be met by clear and convincing evidence in order to compel disclosure of non-confidential materials:

> **(i)** the news or information is highly material or relevant to a significant legal issue before the court or other body;
> **(ii)** the news or information could not, with due diligence, be obtained by alternative means; and
> **(iii)** there is a compelling need for disclosure.

Id.

While the Vermont statute is new, and thus lacks applicable caselaw, the Movant correctly points to similarities with the New York Civil Rights Law § 79-h(c), for which there is a substantial body of caselaw, and which establishes a similar three-prong test requiring:

> [T]he party seeking such news [to make] a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source.

N.Y. Civ. Rights Law § 79-h(c) (McKinney 1990). New York courts have found this law establishes a "qualified privilege as to non-confidential news by requiring disclosure of non-confidential material only as a last resort." *In re Am. Broad. Companies, Inc.*, 735 N.Y.S.2d 919, 921–22 (Sup. Ct. 2001) (citation omitted). In other words, the privilege is not easily overcome "absent clear and specific proof 'that the claim for which the information is to be used virtually rises or falls with the admission or exclusion of the proffered evidence.'" *In re Grand Jury Subpoenas Served on Nat. Broad. Co., Inc.*, 683 N.Y.S.2d 708, 712 (Sup. Ct. 1998) (quoting *In re Application To Quash Subpoena to National Broadcasting Company, et al. v. Graco Children Products, Inc. et al.*, 79 F.3d 346, 351 (2nd Cir. 1996)). Thus, "[t]he test is not merely whether the material may be helpful or probative, but whether the action may be presented without it." *Id.* (internal quotations omitted).

In this case, there seems to be no real dispute on the first prong, that the information sought, the entire video shot by the Channel 3 crew, is highly material and relevant to the significant legal issue presented: the propriety of the actions of the officers in shooting Mr. Giffin. Although it is not the only video, it appears on this record to be the longest, and clearly shows the moment of the shooting. Beyond that, the Parties take vastly different positions,[5] disagreeing about the second and third prongs.

Both Parties focus on the second part of the test, whether the information sought could, with due diligence, be obtained by alternative means. The Movant argues that the State has alternative means to get the information concerning the minutes leading up to the shooting: its 70 witness statements. Indeed, SGT Kinney testified credibly that the police have interviewed about 70 witnesses and obtained statements from them. Of that number, the Court finds based on the testimony that about half saw the shooting and its immediate aftermath, and that that group of witnesses was (1) composed entirely of law enforcement officers and first responders, and (2) some of whom were as close as 25-30 feet away from Mr. Giffin when he was shot. While this argument is appealing, it misses the important difference between eyewitness

[5] The State did not argue that WCAX had waived the privilege by sharing the outtakes with attorney O'Neil. While normally a privilege is waived if the privileged information is shared with a third party by the privilege holder, the Statute seems to pre-empt that argument in subsections (b)(2)(B) and (C) by providing that sharing (publication or dissemination of) information with a third party, e.g., a person other than a journalist (which could be anyone) does not waive the privilege.

accounts, which can vary significantly from one witness to the next, and the fact that a picture or video is often the best evidence of what actually happened.[6]

Thus, the State argues that there is no alternative means to obtain the information represented by the Channel 3 video. The facts support them in this argument to an extent: the police have no other videos of their own that show the events leading up to the shooting as clearly as the Channel 3 video apparently does. However, two other salient facts prevent the Court from adopting, at this time, the *Spooner* rationale concerning alternatives: (1) neither the Attorney General nor the States Attorney have—as of the date of the hearing—viewed any of the investigative materials, be they witness statements, photos, diagrams or videos; and, (2) another TV station, channel 5, filmed some portion of the events, yet, at the time of the hearing on the motion to Quash, the lead investigator in the case had not yet viewed any of that footage, including the published footage, nor had the Attorney General or State's Attorney sought its production through their inquest.

These facts compel the conclusion that the State cannot successfully argue that it lacks alternatives to the Channel 3 video when the prosecutors themselves have no idea what is, in fact, in their own investigative materials. Since they do not at this time know what is in their investigative materials, have not viewed their own videos, and have not viewed the other TV station's videos, they cannot argue either that they have engaged in due diligence or that Channel 3's materials are the only source for information about what happened in the moments leading up to the shooting. SGT Kinney, the lead investigator, has not yet seen the Channel 5 video, not yet seen the crime scene diagram, and has not yet been given all the scene measurements. Thus, neither he nor, more importantly, the investigating prosecutors can yet determine that there are no alternatives.[7]

SGT Kinney testified that the materials WCAX has *might* potentially be relevant, and that knowing or seeing what happened in the minutes before the shooting would be *helpful* to the investigation. [Emphasis added]. However, that is not the legal standard prescribed in the new statute. Rather, the standard is by design a very demanding and difficult one: the Party seeking disclosure must establish by clear and convincing evidence, that the materials sought are "highly material or relevant," AND the information sought "could not, with due diligence, be obtained by alternative means." The test adopted by New York is instructive on this point: 'that

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[6] Indeed, New York courts have acknowledged relying on video in a journalist's possession is a best source of evidence and could satisfy the "alternative source" prong in narrow factual situations such as where the source is unreliable, not cooperative, not credible, or whose memory is distorted or faded. See, e.g., *In re Subpoena Duces Tecum to Ayala*, 616 N.Y.S.2d 575, 578 (Sup. Ct. 1994) (finding the third prong satisfied because the videotape was the best source of information and the one witness was possibly uncooperative, hostile, biased, or whose memory had faded or changed); see also *In re Grand Jury Subpoenas Served on Nat. Broad. Co., Inc.*, 683 N.Y.S.2d 708, 711-13 (Sup. Ct. 1998) (determining that all three prongs were met where the movant broadcaster captured footage of a riot, but where the only known witnesses were the officers who were "surprised and blind-sided during the attacks" and were "unable to identify the perpetrators"; the tapes were thus critical to identifying and then prosecuting the assaultive individuals).

[7] While the Movant, Channel 3, argues that the 70 witness statements are per-se, alternative means, making disclosure of their video unnecessary under the Statute, there is a compelling argument to be made that video of an event provides the objective view of the events not necessarily provided by eyewitness accounts, which as the Supreme Court has observed in *Spooner*, are subject to the "vagaries of perception and memory." See *Spooner*, 2007 VT 98, ¶ 19; see also FN 6 *supra*.

the claim for which the information is to be used virtually rises or falls with the admission or exclusion of the proffered evidence.'" *In re Grand Jury Subpoenas Served on Nat. Broad. Co., Inc.*, 683 N.Y.S.2d 708, 712 (Sup. Ct. 1998) In this case the state has not shown that the claim, e.g., the investigation into the police shooting, "rises or falls" depending on access to the WCAX video. To the contrary, at this point the State is interested in and would like to see the video, but has not yet established that there are no alternatives to that evidence available through due diligence.

On the record adduced thus far, the Court concludes that the State has failed to establish by clear and convincing evidence that the information sought cannot be obtained through due diligence by alternative means. This finding obviates the need, at this point, to consider the third prong of the statute: that there is a compelling need for disclosure.[8]

Accordingly, the Motion to Quash the present subpoena for WCAX TV's videos is granted. The Motion for Protective Order is denied. Inasmuch as this is an ongoing inquest this decision shall remain under seal, as shall the entire inquest file, and shall not be available to the public unless and until the inquest has concluded with indictments or informations. The movant WCAX TV is ordered to preserve any and all materials, videotapes including outtakes, or other documentation of the events of 1/16/18 pending further proceedings in this Court, other Courts, or other matters.

So Ordered at Barre, Washington County, Vermont this 16th day of February, 2018.

H E VanBenthuysen

Howard E. VanBenthuysen
Superior Court Judge

Cc: Parties

[8] At hearing, the State also proposed that the Court review the requested materials *in comero* to determine whether and what information on WCAX's 38-plus minutes of footage would satisfy the three-prong test. While the Court can see the benefit of *in comero* review, it seems that to grant such a request, the State should still be put to the task in meeting its statutory burden. In this case, at this point, the State has not yet even met the second prong. See, e.g., *In re Subpoeno Duces Tecum to News 12 for Prod. of Interview between Roy Roimundi & Defendont, Including Brood. & Non-Brood. Footoge*, 29 N.Y.S.3d 850 (N.Y. Sup. Ct. 2015), aff'd as modified sub nom. *People v. Bonie*, 35 N.Y.S.3d 53 (N.Y. App. Div. 2016) (ordering *in comero* review only after determining that the government had met its burden under the three prongs).